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No. 71-286

In the Supreme Court of the United States

OCTOBER TERM, 1971

S.F.H., INC. (FORMERLY SAM FORTAS HOUSE-FURNISHING CO., INC.), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (Pet. App. 23–35) is reported at 53 T.C. 28. The opinion of the court of appeals (Pet. App. 15–22) is reported at 444 F. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1971. The petition for a writ of certiorari was filed on August 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether petitioner was precluded by Section 382 of the Internal Revenue Code of 1954 ("Special Limitations on Net Operating Loss Carryovers") from carrying over to its taxable year ended June 30, 1962, a net operating loss sustained in a prior taxable year, because all of its stock had been sold during the taxable year and at the end of that year it was no longer carrying on substantially the same business (selling furniture at retail) as it conducted before such sale.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and of the Treasury Regulations on Income Tax (1954 Code) are set forth in the petition (pp. 3–5).

STATEMENT

Petitioner had for many years engaged in the business of selling furniture at retail, reporting its income from sales in accordance with the installment method of accounting on the basis of a taxable year ending June 30. For the taxable year ended June 30, 1961, petitioner incurred a net operating loss arising from the operation of the retail furniture business of $167,807.18. After carrybacks, there remained $159,830.76 for carryover to future years. (Pet. App. 16.)

On August 11, 1961, Son-Mark Industries, Inc., the sole owner of petitioner's capital stock, sold all of the stock to Merion Securities, Inc. On October 27, 1961, Merion acquired control of Mount Clemens Metal Products Company, and on that same date, petitioner

sold all of its assets, subject to its liabilities, to Mount Clemens for cash. Immediately thereafter petitioner purchased 85,000 shares of the capital stock of Mount Clemens from Merion. (Pet. App. 16.)

After October 27, 1961, and on June 30, 1962, the last day of the taxable year in issue, petitioner no longer carried on the retail furniture business. Its only assets after October 27, 1961, consisted of 85,000 shares of Mount Clemens stock, cash of less than $1,000 and a claim for refund of federal income tax in the amount of $6,480.59. Petitioner did not carry on any other business through the date of its dissolution on June 30, 1964. (Pet. App. 16–17.)

On its income tax return for the year ended June 30, 1962, petitioner reported a gross profit from sales of $349,508.67. This consisted of $131,448.11, gross profit from current year's sales, and $218,060.56, gross profit from prior years' sales realized in the current year, by way of either current year's collections, or the disposition by petitioner on October 27, 1961, of all of its installment accounts receivable to Mount Clemens. Petitioner claimed a net operating loss carryover deduction of $133,398.08 on its return, which the Commissioner disallowed on the ground that during the taxable year petitioner's capital stock was purchased by new owners who caused it to discontinue its retail furniture business before the end of the taxable year. (Pet. App. 17.) The Tax Court sustained the Commissioner's determination in a reviewed decision, two judges dissenting (Pet. App. 23–35), and the court of appeals affirmed (Pet. App. 15–22).

ARGUMENT

The decision below is correct. There is no conflict or other warrant for further review.

1. The precise and unequivocal language of Section 382(a)(1)(C) of the Internal Revenue Code of 1954 compels the result reached in this case by the Tax Court and the court of appeals. That section provides that "If at the end of a taxable year," in which 50 percent or more of a corporation's stock has been sold, the corporation "has not continued to carry on a trade or business substantially the same as that conducted before" such change in ownership, the corporation may not utilize a prior year's net operating loss carryover as a deduction from income. The undisputed facts show that (a) the "business" conducted by petitioner before the sale of its stock was that of selling furniture at retail, (b) prior to the end of the taxable year in which petitioner's stock was sold, it sold (on October 27, 1961) all of its operating assets for cash and discontinued its furniture business, and (c) thereafter it engaged in no business at all. Thus, the court below correctly concluded that at the end of the taxable year in question (June 30, 1962) petitioner was not carrying on substantially the same business as that conducted before the sale of its stock, as required by Section 382(a)(1)(C).

Petitioner's contention (Pet. 9) that Section 382(a) denies the operating loss carryover only when there has been a change rather than a discontinuance of the corporation's business finds no support in the plain and unambiguous language of the statute. The statute,

in clear and simple terms, requires the corporation at the end of the taxable year of the stock sale "to carry on a trade or business substantially the same as that conducted before" the stated change in its ownership. Petitioner's failure to satisfy this requirement is fatal to its loss carryover claim. Cf. *Commissioner* v. *Barclay Jewelry, Inc.* 367 F. 2d 193 (C.A. 1); *Glover Packing Co. of Texas* v. *United States,* 328 F. 2d 342 (Ct. Cl.).

2. Petitioner contends (Pet. 9–12) that there was no congressional purpose to deny a loss carryover under the particular circumstances of this case, and relies upon this Court's decision in *Libson Shops, Inc.* v. *Koehler,* 353 U.S. 382, which arose under the 1939 Code, and on the legislative history of Section 382(a). But, as this Court observed in *Commissioner* v. *Gordon,* 391 U.S. 83, 91–93, in construing another of the highly technical provisions of Subchapter C of the 1954 Code, clear statutory language, and not Congress' general purpose, is to control in cases of this type—

> The requirements of the section are detailed and specific, and must be applied with precision. * * * [A]lthough a court may have reference to this purpose [Congress' general purpose] when there is a genuine question as to the meaning of one of the requirements Congress has imposed, a court is not free to disregard requirements simply because it considers them redundant or unsuited to achieving the general purpose in a particular case.

Here, as in *Gordon*, there is no serious question regarding the meaning of the requirements which Congress has imposed.

Finally, there is no merit to petitioner's suggestion (Pet. 9) that the claimed carryover should be allowed because the acquisition of its stock was not motivated by tax avoidance objectives, *i.e.*, "trafficking" in net operating loss carryovers. The disallowance of the claimed carryover here is based on the limitation provisions of Section 382, not on Section 269, which independently requires its disallowance where a taxpayer's stock is acquired for the primary purpose of tax avoidance. See *Libson Shops, Inc.* v. *Koehler*, *supra*, 353 U.S. at 388–389.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971